**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF KANSAS**

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| JAMES A. CLARY, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | CASE NO. 03-1168-JTM |
| | ) | |
| THE STANLEY WORKS, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

## MEMORANDUM AND ORDER

The court now considers a Motion to Stay Action Pending Arbitration and to Compel Arbitration (Doc. 6), filed by defendant The Stanley Works (Stanley). Stanley subsequently submitted an amended motion seeking the same relief, and containing small administrative changes. (Doc. 10.) Plaintiff James A. Clary (Clary) filed a response. (Doc. 9.) Stanley submitted a reply and supporting affidavit. (Docs. 13, 14.) Clary then filed a motion for leave to file a surreply (Doc. 15), which was granted by Judge Marten. (Doc. 17.) Twenty minutes after Judge Marten's order was filed, Stanley filed its Opposition to Clary's Motion for Leave to File a Surreply. (Doc. 18.) Clary subsequently filed his surreply (Doc. 19), and Stanley was granted leave to respond thereto. (Doc. 20.) That response

has now been filed. (Doc. 21.) After consideration of all the pleadings, briefs, affidavits, and exhibits, Stanley's motion and amended motion (Docs. 6, 10) are DENIED, for reasons set forth herein.

## BACKGROUND

Clary brought the present action in state court seeking damages for breach of an employment contract and non-payment of wages under the Kansas Wage Payment Act. (Doc. 3.) Stanley removed the action to federal court based on diversity. (Doc. 1.) Both parties agree that an employment agreement exists, *see* Doc. 11 at 2; Doc. 9 at 9, however, they dispute the source of the terms of the agreement. Stanley maintains that the agreement is defined by the written terms of the Mac Direct Sales Representative Agreement (MDSRA). *See* Doc. 11 at 2-3. Clary alleges that the MDSRA was not provided to him until after he was hired (Doc. 9 at 2), that it was provided to him in the form of post-hire employment paperwork, *see id.* at 4, and that he was unaware of the contents therein. *See id.* Instead, Clary claims that the employment agreement arose from oral promises and representations made from his Stanley supervisors, as well as from their conduct during his employment. *See id.* at 9.

The validity of the written MDSRA is crucial to the arbitration issue

because the MDSRA contains the arbitration clause. (Doc. 11 exh. 1, exh. B ¶ 9). Unfortunately, the MDSRA expressly states that the agreement will only be effective if executed by Clary and Stanley in Ohio. *See id.* ¶ 11. Stanley never signed the document. *See id.* at 5. These undisputed facts cast considerable doubt on the validity of the MDSRA in defining the terms of Clary's employment. Accordingly, the validity of the MDSRA is a threshold question that must be answered to determine whether the proceedings should be stayed pending arbitration.

## MAGISTRATE'S AUTHORITY TO STAY PROCEEDINGS AND COMPEL ARBITRATION

A magistrate may rule on non-dispositive matters. *See* 28 U.S.C. § 636(b)(1)(A). The district courts that have considered the nature of an order to stay proceedings pending arbitration and to compel arbitration have concluded that these are non-dispositive orders. ***Torrance v. Aames Funding Corp.***, 242 F. Supp. 2d. 862, 865 (D. Or. 2002); ***Herko v. Metro. Life Ins. Co.***, 978 F. Supp. 141, 142 n.1 (W.D.N.Y. 1997); *see also* ***Touton, S.A. v. M.V. Rizcun Trader***, 30 F. Supp. 2d 508, 509 (E.D. Pa. 1998) (staying proceedings pending arbitration is not injunctive relief under 28 U.S.C. § 636(b)(1)(A)). In ***Herko***, the court

discussed the matter in detail and concluded that, because the parties must return to the district court to have the arbitration award confirmed, modified, or vacated under 9 U.S.C. §§ 9-11, the district court retains jurisdiction even during the arbitration. ***Herko***, 978 F. Supp. at 142 n.1. Accordingly, the order to stay proceedings and compel arbitration was non-dispositive and within the magistrate's authority. *See id.*

Like ***Herko***, the arbitration clause in the MDSRA allows either party to have the arbitration award confirmed in a federal district court under 9 U.S.C. § 9. *(*Doc. 11 exh. 1, exh. B ¶ 9(d).) Furthermore, 9 U.S.C. §§ 10 and 11 authorize any party to proceed in federal district court to have the arbitration award vacated or modified. Under all these circumstances, the district court retains authority to review the arbitration award once arbitration has been completed.

The Tenth Circuit used virtually the same rationale as ***Herko*** to conclude that "a stay of a federal suit pending arbitration is not a final order under 28 U.S.C. § 1291." ***Pioneer Props., Inc. v. Martin***, 776 F.2d 888, 891 (10th Cir. 1985). Like ***Herko***, the Tenth Circuit based its holding on the fact that the federal courts retained authority to review the arbitration award under 9 U.S.C. § 10. *Id.* Although ***Pioneer Properties*** did not deal directly with a magistrate's authority to stay proceedings or compel arbitration, its reasoning was virtually identical to

***Herko***, and clearly confirms that orders to stay proceedings and compel arbitration are non-dispositive because they do not terminate all proceedings in the federal courts.[1] Therefore, a federal magistrate judge does have authority to rule on a motion to stay proceedings and compel arbitration, since this amounts to a non-dispositive pre-trial matter.

## WAS THERE AN AGREEMENT TO ARBITRATE?

Stanley filed the present motion asking the court to exercise its authority under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-307, to stay proceedings and compel arbitration. Section 3 of the FAA requires the court to stay proceedings on any matter referable to arbitration under a written arbitration agreement. 9 U.S.C. § 3. Additionally, section 4 of the FAA directs the court to

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[1] Contrary to some other circuits, the Tenth Circuit *has* ruled that a magistrate lacks authority to remand a case to a state court because this has the effect of terminating all proceedings in federal court and is, thus, dispositive. ***First Union Mortgage Corp. v. Smith***, 229 F.3d 992, 996 (10th Cir. 2000). In so holding, the circuit court concluded that a remand order *was* a final order under 28 U.S.C. § 1291. The court notes that this is contrary to ***Herko***'s conclusion that magistrates do have authority to remand a case to state court. *See* ***Herko***, 978 F. Supp. at 142 n.1. Although ***Herko*** is inconsistent with Tenth Circuit law regarding a magistrate's authority to remand to state courts, ***Herko*** is consistent with ***Pioneer Properties*** regarding the non-dispositive nature of orders to stay proceedings and compel arbitration under the Federal Arbitration Act. Accordingly, ***Herko*** is persuasive in the instant case, particularly in light of its striking consistency with ***Pioneer Properties***.

compel arbitration when one of the parties to a written agreement refuses to arbitrate. *Id.* § 4. Inherent in both these sections is the requirement that there be an agreement, and that the agreement be in writing.

## ***Choice of Law***

"The existence of an agreement to arbitrate is a threshold matter which must be established before the FAA can be invoked." ***Avedon Eng'g, Inc. v. Seatex***, 126 F.3d 1279, 1287 (10th Cir. 1997). Furthermore, the court will apply state law contract principles to determine whether the parties actually agreed to arbitrate. *See* ***First Options of Chicago, Inc. v. Kaplan***, 514 U.S. 938, 944, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d 985 (1995); ***Avedon***, 126 F.3d at 1287. In a diversity case, the court applies the substantive law of Kansas, including its choice of law rules. ***Moore v. Subaru of America***, 891 F.2d 1445, 1448 (10th Cir. 1989).

The MDSRA contains a choice-of-law clause that declares the contract will be governed by Ohio law. (Doc. 11 exh. 1, exh. B ¶ 11). Although Kansas courts will usually honor choice-of-law provisions if the forum selected has some reasonable relationship to the contract at issue, that rule assumes that the parties have actually agreed to the choice of law provision. *See* ***Hermelink v. Dynamex Operations E., Inc.***, 109 F. Supp. 2d 1299, 1302-1303 (D. Kan. 2000). In this

case, the parties dispute whether the MDSRA was ever validly executed. Accordingly, the validity of the agreement, including the choice of law provision, must be evaluated prior to applying Ohio law.

Kansas follows the doctrine of *lex loci contractus*, applying the law of the state where the contract is made. ***Novak v. Mut. of Omaha Ins. Co.***, 29 Kan. App. 2d 526, 534, 28 P.3d 1033, 1039 (2001). "A contract is made where the last act necessary for its formation occurs." *Id.* In this case, the inquiry proceeds even one step further back, to determine if the contract was made at all. The facts of the case make the question more complex than might first appear.

Paragraph 11 of the MDSRA reads in pertinent part, "[t]his Agreement is effective upon its execution by Mac Tools *and* you *in Ohio*." (Doc. 11 exh. 1, exh. B ¶ 11) (emphasis added). As further evidence of what was meant by "execution," the MDSRA went on to say, "HAVING READ THIS AGREEMENT, EACH OF THE PARTIES VOLUNTARILY *EXECUTES* THIS AGREEMENT," after which signature blocks were provided for the parties. *See id.* at 5 (emphasis added) (capitalization in original). Although Clary signed the MDSRA, no one signed for Mac Tools or Stanley. *See id.* Stanley asserts that, despite its failure to sign, the agreement became effective either when Clary signed it (Doc. 11 at 7), or by Stanley's subsequent conduct in reliance on the agreement. *See id.* Neither party

having presented any evidence that any of these acts were performed outside the state of Kansas, the court will apply Kansas law in determining whether the parties agreed to arbitrate.

***Interpreting MDSRA ¶ 11***

In deciding a motion to stay proceedings and a motion to compel arbitration, the court follows a procedure similar to that used in ruling on a motion for summary judgment. ***Phox v. Atriums Mgmt. Co.***, 230 F. Supp. 2d 1279, 1282 (D. Kan. 2002); ***Klocek v. Gateway, Inc.***, 104 F. Supp. 2d 1332, 1336 (D. Kan. 2000). Stanley bears the initial burden of showing that it is entitled to arbitration. ***Phox***, 230 F. Supp. at 1282. If Stanley satisfies this requirement, then the burden shifts to Clary to show a genuine issue for trial, as provided under 9 U.S.C. § 4.[2] *See id.*

[2] Although Section 4 of the FAA calls for a hearing (and perhaps a jury trial) when the parties disagree over whether there is an agreement to arbitrate, 9 U.S.C. § 4, the courts that have interpreted this language have adhered to traditional requirements for hearings and juries. Hence, a court need not hold a hearing when the issues involve only questions of law. ***Cincinnati Gas & Elec. Co. v. Benjamin F. Shaw Co.***, 706 F.2d 155, 159 (6th Cir. 1983); ***Int'l Union of Operating Eng'rs, Local Union No. 139 v. Carl A. Morse, Inc.***, 529 F.2d 574, 581 (7th Cir. 1976). Similarly, the party opposing arbitration can't obtain a jury trial without producing some evidence upon which a jury could find for him. *See* ***Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.***, 961 F.2d 1148, 1154 (5th Cir. 1992). Since Kansas considers the interpretation of unambiguous contract terms to be a question of law, ***Reimer v. Waldinger Corp.***, 265 Kan. 212, 214 (1998), no hearing is required for the court to interpret MDSRA ¶ 11.

As discussed earlier, in order to satisfy its initial burden, Stanley must show that the parties agreed to arbitrate, and that the arbitration agreement is in writing. 9 U.S.C. § 2. Complicating that matter is the plain language of the MDSRA ¶ 11, which states "[t]his Agreement is effective upon its execution by Mac Tools and you in Ohio." (Doc. 11 exh. 1, exh. B ¶ 11.) Mac Tools is a division of Stanley, and no one ever signed the document on behalf of Mac Tools or Stanley. (Doc. 11 exh. 1, exh. B at 5.) Stanley maintains that its failure to sign is no bar to the arbitration clause, since the FAA merely requires the agreement be in writing, and not that the agreement be signed. *See* 9 U.S.C. §§ 2-4.

As a general rule, arbitration agreements do not require a signature, so long as the agreement is in writing. ***Med. Dev. Corp. v. Indus. Molding Corp.***, 479 F.2d 345, 348 (10th Cir. 1973). However, ***Medical Development Corp***, and similar cases were decided in the context of contracts that did not contain express signature requirements. Conversely, the language in MDSRA ¶ 11 suggests that the agreement would *only* be effective if signed. (Doc. 11 exh. 1, exh. B ¶ 11.)

Under Kansas law, contract language is given its plain meaning if the language is clear and unambiguous. ***Thomas v. Thomas***, 250 Kan. 235, Syl. ¶ 3, 824 P.2d 971 (1992). On the other hand, ambiguous language is construed against the drafter. ***Liggatt v. Employers Mut. Cas. Co.***, 46 P.3d 1120, 1126 (Kan. 2002).

If MDSRA ¶ 11 is considered clear and unambiguous, it can only mean that both Stanley and Clary had to sign the document in order to make the agreement effective. Similarly, if ¶ 11 is considered ambiguous, construing it against the drafter, presumably Stanley, yields the same conclusion. Therefore, ¶ 11 of the MDSRA required Stanley's signature in order to make the agreement, including the arbitration clause, effective. Accordingly, Stanley's failure to comply with this requirements means that the parties never agreed to arbitrate and, thus, Stanley is not entitled to stay the proceedings and compel arbitration. *See also* ***Short v. Sunflower Plastic Pipe, Inc.***, 210 Kan. 68, Syl. ¶ 6, 500 P.2d 39 (1972) (if the parties "intend a formal written instrument to be signed by the parties before it takes effect, absent such executed written document *there is no enforceable contract between the parties*.") (emphasis added).

As an alternative to the necessity that it execute the MDSRA, Stanley argues that its "retention of Plaintiff in its employment" (Doc. 13 at 4) constitutes acceptance of the MDSRA and the associated arbitration agreement. In effect, Stanley argues that the parties, through their conduct, amended the MDSRA to permit acceptance other than through execution, as required by MDSRA ¶ 11. This contention, however, flies in the face of the MDSRA's express requirement that "[a]mendments to this Agreement may only be made *in writing* and *signed* by

you *and an officer of Mac Tools*." MDSRA ¶ 12. This language reinforces the necessity that both parties sign (execute) the MDSRA before it becomes effective, and prevents any amendment of the MDSRA by means other than a *written* document, *signed by both parties*. Accordingly, the parties' conduct could not operate to make the MDSRA effective. Only a signature by Mac Tools could do that, and the absence of such a signature is fatal to the agreement.

In sum, the court finds that MDSRA ¶ 11 required Clary and Stanley to sign the agreement before it became enforceable. Since Stanley failed to sign, no enforceable, written agreement to arbitrate ever came into existence. Therefore, Stanley failed to satisfy its initial burden of showing that it is entitled to arbitration.

## ENFORCEABILITY AND SEVERABILITY

The court's conclusion that the parties did not agree to arbitrate is dispositive of this matter, and the other arguments advanced by the parties need not be considered. Nonetheless, the parties focused the majority of their briefings on arguments and counter-arguments about whether this agreement was enforceable. Indeed, the court received five briefs on this motion. In four out of those five briefs, a majority of the argument was focused on the issues of

enforceability and severability. Based on the focus the parties have placed on these issues, and considering the likelihood of an appeal in this case, the court will address them as an alternative basis for its holding.

Clary argues that even if the parties agreed to arbitrate, the agreement is not enforceable. The United States Supreme Court gave guidance on the requirements for enforceability of arbitration agreements in ***Gilmer v. Interstate/Johnson Lane Corp.***, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991). The D.C. Circuit later refined that discussion to conclude that an arbitration agreement may be enforceable if it

> (1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.

***Cole v. Burns Intern. Sec. Services***, 105 F.3d 1465, 1482 (D.C. Cir. 1997). The Tenth Circuit subsequently cited ***Cole***'s discussion of these factors with approval, and applied the fifth factor to find an arbitration clause unenforceable. ***Shankle v. B-G Maint. Mgmt. of Colo., Inc.***, 163 F.3d 1230, 1234 (10th Cir. 1999). ***Shankle*** also cited ***Graham Oil Co. v. ARCO Prod. Co.***, 43 F.3d 1244, 1247-48 (9th Cir.1994) for the proposition that arbitration clauses may be rendered

unenforceable if they do not provide for all the remedies available under a statute. *See* ***Shankle***, 163 F.3d at 1234; ***Graham***, 43 F.3d at 1247-48 (finding arbitration clause unenforceable because it prohibited recovery of exemplary damages, which were specifically available under the statute at issue); *see also* ***Gilmer***, 500 U.S. at 26, 111 S. Ct. at 1652 (quoting ***Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.***, 473 U.S. 614, 628, 105 S. Ct. 3346, 3354, 87 L. Ed. 2d 444 (1985)) ("[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."). This suggests that the Tenth Circuit also agrees with ***Cole***'s fourth factor. Accordingly, an arbitration agreement cannot be used to eviscerate the law by removing all but the most meager forms of relief that would be available in the judicial forum.

***Damages Limitation Clause***

Turning to the facts of this case, Clary argues the arbitration clause in the MDSRA is unenforceable because it violates the second, fourth and fifth ***Cole*** factors. (Doc. 9 at 16.) His strongest argument appears to be based on the fourth factor - that the agreement must provide for all the relief that would be available in court. Paragraph 9(e) of the MDSRA specifically limits the available remedies to

"actual direct damages," and expressly precludes the parties from seeking "punitive, exemplary, indirect, special, consequential or incidental damages." (Doc. 11 exh. 1, exh. B ¶ 9(e).) Clary states a claim for unpaid wages under the Kansas Wage Payment Act, K.S.A. 44-313 to 44-327, which provides for statutory penalties against employers who violate the act. *See* K.S.A. 44-315(b). Furthermore, Clary states claims for retaliatory discharge based on his wage payment complaints and workers' compensation claims. (Doc. 9 at 9.) Under Kansas law, punitive damages may be available if a plaintiff proves a retaliatory discharge claim. *See* ***Murphy v. City of Topeka-Shawnee County Dept. of Labor Servs.***, 6 Kan. App. 2d 488, Syl. ¶ 7, 630 P.2d 186 (1981). Accordingly, at least some of Clary's claims, if proven, entitle him to relief which will be unavailable under the arbitration agreement. Therefore, the arbitration agreement is unenforceable as to any claims for which Clary might otherwise recover something besides actual direct damages, because it fails to satisfy the fourth ***Cole*** factor, providing for all the types of relief that would be available in court. *See* ***Cole***, 105 F.3d at 1482.

Stanley counters this conclusion by arguing that the provision limiting Clary to recovery of actual direct damages should be severed, and the rest of the arbitration agreement enforced as written. (Doc. 13 at 9.) Stanley is correct in

concluding that Kansas favors severing offending provisions from contracts, rather than voiding the entire contract. *See* ***Miller v. Foulston, Siefkin, Powers & Eberhardt***, 246 Kan. 450, 462, 790 P.2d 404, 413 (1990). However, the question in this case is whether to sever the damage limitation provision from the arbitration paragraph, or sever the arbitration paragraph from the MDSRA. In ***Shankle v. B-G Maint. Mgmt. of Colo., Inc.***, 163 F.3d 1230 (10th Cir. 1999), the Tenth Circuit specifically refused to sever a provision in an arbitration agreement that violated one of the ***Cole*** factors, concluding that where the contract lacked ambiguity that invited such an action, the court was not at liberty to alter invalid contract terms. *See id.* at 1235 n.6. Instead, the circuit court found the entire arbitration agreement unenforceable. *Id.* at 1235-36.

Like ***Shankle***, this case involves at least one arbitration provision that clearly violates the ***Cole*** factors adopted by the Tenth Circuit. Moreover, this court agrees with Clary's observation that an overeagerness to sever offending provisions will encourage parties with superior bargaining power to load their arbitration agreements with questionable, or even clearly unlawful, provisions. (Doc. 19 at 4.) Arbitration clauses may effectively become *in terrorem* devices, whose purpose is to frighten away potential litigants. *See* ***Bailey v. Ameriquest Mortgage Co.***, 2002 WL 100391, at *8 (D. Minn. 2002). Then, for those brave

souls who are willing to challenge the unlawful provisions, the courts will simply whittle down the arbitration clause until it is within the outer limits of enforceability. *See id.* Such a system flies in the face of the Supreme Court's conclusion that arbitration furthers broader social purposes by providing an alternative forum where a prospective litigant may effectively vindicate his rights. *See* ***Gilmer v. Interstate/Johnson Lane Corp.***, 500 U.S. 20, 28, 111 S. Ct. 1647, 1653, 114 L. Ed. 2d 26 (1991). In order to promote fundamental fairness in the arbitral arena, courts must require parties to reach an arbitration agreement that is enforceable as written. Accordingly, the court will not sever the damage limitation clause in order to render the arbitration agreement enforceable.

***Costs to Access Arbitral Forum***

In addition to the fourth ***Cole*** factor, Clary also argues that the arbitration agreement would be unenforceable based on the fifth ***Cole*** factor, that the agreement not impose unreasonable costs as a condition of access to the arbitral forum. The arbitration clause specifies Columbus, Ohio, as the place where arbitration will occur. (Doc. 11 exh. 1, exh. B ¶ 9(d).) Clary claims that it will cost him at least $1,500 for he and his lawyer to travel to Columbus. (Doc. 9 at 19.) Furthermore, the arbitration clause states that "[i]f either party is required to

incur costs and expenses in connection with the selection of an arbitrator by CPR, Inc., that party shall be reimbursed for such costs and expenses by the other party." (Doc. 11 exh. 1, exh. B ¶ 9(f).) This provision seems to create another unquantifiable cost for which Clary may be liable as a condition of access to arbitration. Clary claims that he cannot afford the $1,500 travel expenses, much less the unknown costs of selecting an arbitrator. (Doc. 9 at 19.)

"[A]n arbitration agreement that prohibits use of the judicial forum . . . must also provide for an effective and *accessible* alternative forum." ***Shankle v. B-G Maint. Mgmt. of Colo., Inc.***, 163 F.3d 1230, 1234 (10th Cir. 1999) (emphasis added). In determining when costs of arbitration unfairly limited access to the alternative forum, ***Shankle*** concluded that a fee-splitting obligation whereby both parties to the arbitration would be liable for a minimum cost of approximately $1,875 in arbitrator fees was prohibitive when one party was an employee who could not afford such an expense. *See id.* at 1234-35. ***Shankle*** went on to conclude that such an arrangement precluded access to the alternative forum, thereby rendering the arbitration agreement unenforceable under the FAA. *See id.* at 1235.

In the present case, Clary alleges that he will be liable for approximately $1,500 in travel expenses, plus any costs incurred by Stanley to select an

arbitrator. This appears to be sufficiently close to the costs that ***Shankle*** found prohibitive. Therefore, if Clary could prove his expenses, it is possible that they might be found to prohibit his access to the arbitral forum; however, the court notes that such a determination is a fact issue, and would need to be evaluated in a hearing, perhaps even a jury trial, pursuant to section 4 of the FAA. 9 U.S.C. § 4.

In order to preclude the necessity for such a fact determination, Stanley counters that, pursuant to MDSRA ¶ 9(d), it is willing to "stipulate to conducting arbitration in a location more convenient to Plaintiff." (Doc. 13 at 7.) Unfortunately, the express terms of MDSRA ¶ 9(d) require that both parties agree in writing to such a location change. Furthermore, courts are in the business of enforcing lawful contracts, not forcing people into agreements under duress. MDSRA ¶ 9(d) contemplates that the parties may mutually agree to arbitrate in a different geographic location. No such agreement has been made. Asking the court to foist such an agreement on an unwilling party promotes the same sort of mischief that the court denounced in addressing Stanley's severability argument, *supra*. The parties need to reach an arbitration agreement that is enforceable in the first instance, and not one that is only valid after substantial judicial tinkering.

***Limited Discovery***

Finally, Clary argues that the agreement is unenforceable because it fails to provide for more than minimal discovery, thereby violating the second ***Cole*** factor. (Doc. 9 at 19-20.) Under the rules applicable to this arbitration, the arbitrator "may require and facilitate such disclosure as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost effective." (Doc. 14, Aff. of Merriam Lieberson, exh. A ("CPR Rule 11").)[3] Clary characterizes this as "minimal discovery" that fails to satisfy the requirements laid down in ***Cole***. (Doc. 9 at 19.)

On the contrary, the discovery rule in ***Cole*** stated that the arbitrator had "the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute." ***Cole***, 105 F.3d at 1480. Although the ***Cole*** provision elaborates on the tools available for discovery, it is otherwise strikingly similar to the rule applicable in the present case. Indeed, nothing in CPR Rule 11 precludes the use of any the discovery tools mentioned in ***Cole***; nor does the ***Cole***

[3] The parties presented different versions of the applicable CPR Rules. (Doc. 13 at 6 n. 3.) The court has reviewed both versions and concludes that the only difference is that the international version refers to "disclosure," while the domestic version refers to "discovery." Accordingly, the meaning of CPR Rule 11 does not change for our purposes, regardless of which version applies.

provision mandate the use of any particular discovery tools. Accordingly, the discovery available under CPR Rule 11 meets the minimal discovery requirements outlined in ***Cole***, and will not bar enforcement of an otherwise enforceable agreement to arbitrate.

In sum, if the parties had a written agreement to arbitrate, it would be rendered unenforceable due to its failure to provide for all the remedies available in the judicial forum. Furthermore, a fact issue exists as to whether the costs of travel and arbitrator selection operate to preclude Clary's access to the arbitral forum. Neither of these problems may be remedied by severing or altering the agreement.

**IT IS THEREFORE ORDERED** that Stanley's Motion and Amended Motion to Stay Proceedings and Compel Arbitration (Doc. 6, 10) are DENIED.

Dated at Wichita, Kansas, on this 24th day of July, 2003.

s/ Donald W. Bostwick
DONALD W. BOSTWICK
United States Magistrate Judge